HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI

AND

HON'BLE SRI JUSTICE R. SUBHASH REDDY

Writ Petition No. 27606 of 2005

Between:

M/s. The Plant Protection Products Pvt. Ltd.,

Nellore.

… Petitioner.

And

Union Bank of India, Nellore Branch

and others.

… Respondents.

:: ORDER::

Counsel for the petitioner : Sri G. Dhananjai

Counsel for the respondent No.1 : Sri A. Krishnam Raju

December 27, 2005

Per G.S. Singhvi, CJ.

This petition is yet another illustration of attempt by those who take loan from public financial institutions but do not repay the same for years together and then seek intervention of one or the other Court for frustrating the proceedings initiated by the concerned public financial institution for recovery of public money.

Petitioner No.1 is a private limited company. Petitioner No.2 is its managing director. Respondents 2 to 5 are the directors. In 1997, petitioner No.1 approached the authorities of Nellore Branch of Union Bank of India (hereinafter described as 'the Bank') for grant of loan and other facilities. The competent authority of the Bank sanctioned Rs.45,00,000/- towards cash credit hypothecation facility, Rs.10,00,000/- for secured overdraft facility, Rs.10,00,000/- for cheque purchase facility, Rs.20,00,000/- for letter of credit facility and Rs.6,00,000/- for term loan facility. Petitioner No.2 and respondents No.2 to 5 furnished various securities for repayment of loan. Thereafter, petitioner No.1 availed various financial benefits in terms of the sanction issued by the competent authority of the Bank. In April and September 2001 the petitioners and respondents 2 to 5 confirmed their liability to repay the loan etc., with interest. On 6-2-2001, petitioner No.1 informed the Bank that production had been stopped in the factory since August 2000 due to seizure of stocks and suspension of manufacturing licence. In 2001, the Bank filed an application under Section 19 of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (for short 'the Act') for payment of Rs.61,74,277 outstanding under cash credit hypothecation facility account and Rs.12,61,121/- under secured overdraft book debt facility. The Bank also applied for temporary injunction against disposal of properties by the petitioners and respondents No.2 to 5. Debts Recovery Tribunal, Hyderabad (for short 'the Tribunal') accepted the Bank's prayer and granted temporary injunction. Later on, the Tribunal appointed Commissioner for taking inventory and sale of moveable assets. Accordingly, Commissioner sold moveable assets and recovered a sum of Rs.2,98,000/- which was deposited

with the Tribunal.

In the year 2002, the original application filed by the Bank was transferred to Visakhapatnam Bench of the Tribunal and was registered as O.A.No.234 of 2002. The notice sent by the Tribunal through courier was received by one of the directors viz., M. Venkateswarlu. Another director, namely, Sri V. Nandagopal refused to accept service and, as such, he was treated as duly served. Fresh summons were issued to the remaining directors. On 4-12-2002, a letter was received from Sri S.J. Mehta, who sought adjournment. Notices issued to the other directors were ordered to be served through substituted service by publication. On 6-3-2003 the Bank filed the required publication. However, on the date of hearing, neither the petitioners nor respondents No.2 to 5 appeared before Visakhapatnam Bench of the Tribunal. Therefore, after hearing representative of the Bank, the Tribunal passed order dated 24-4-2003 vide which the original application was decreed in the following terms:

a. The defendants are jointly and severally liable to pay Rs.61,74,277/- under cash credit hypothecation facility with interest @ 16.85% per annum thereon with quarterly rests from the date of this OA till 18-11-2001;

b. Rs.2,98,000/- shall be deducted from the total arrived as on 18-11-2001;

c. The defendants are jointly and severally liable to pay the balance amount after deducting Rs.2,98,000/- with interest @ 16.85% per annum thereon with quarterly rests from
19-11-2001 till the date of this order;

d. The defendants are jointly and severally liable to pay further simple interest @ 16.85% per annum on such amount from the date of this order till the date of realization;

e. The defendants are jointly and severally liable to pay Rs.12,61,121/- under secure overdraft (book debt)

facility with interest @ 16.85% per annum thereon with quarterly rests from the date of this OA till the date of this order;

f. The defendants are further jointly and severally liable to pay simple interest @ 16.85% per annum on Rs.12,61,121/- from the date of this order till realization;

g. The defendants are given three months time to pay the debt;

h. In default, the immovable mortgaged properties mentioned in “A” to “K” Schedule shall be sold and the sale proceeds be deposited into the Tribunal for the purpose of applying towards discharge of the debt;

i. Accordingly issue Recovery Certificate.

The petitioners and respondents No.2 to 5 did not pay the decretal amount necessitating issuance of recovery certificate dated 17-9-2004 under Section 19 (22) of the Act. After another 1 year and 2 months, the Recovery Officer issued proclamation of sale under Rule 38.52 (2) of the Second Schedule appended to the Income Tax Act, 1961.

On realizing that they will not be able to stall the proceedings of recovery, the petitioners attempted to file a petition dated 23-12-2005 under Order 9 Rule 13 for recalling order dated 24-4-2003 on the ground that the same had been passed ex parte without service of notice on them. After three days, the petitioners filed the present petition with a prayer that the proceedings initiated for recovery of the amount specified in decree dated 24-4-2003 passed by Visakhapatnam Bench of the Tribunal may be stayed.

Learned counsel for the petitioners submitted that on account of non-availability of the Presiding Officer of the Tribunal at Visakhapatnam, the application filed by his clients could not be taken up for hearing and, therefore, this Court should intervene and protect their legitimate right. He emphasized that the petitioners cannot be

deprived of their right to contest the claim of the Bank merely because of the non-availability of the Presiding Officer of the Tribunal. Learned counsel then argued that order and decree dated 24-4-2003 passed by Visakhapatnam Bench of the Tribunal should be declared as nullity because the petitioners and respondents No.2 to 5 were not served with the notices issued by the Tribunal.

In the context of the submissions made by the learned counsel, we enquired from him whether his clients had between 2002 and 2003 made any attempt to find out the fate of the case which was instituted in Hyderabad Bench of the Tribunal. To this, the learned counsel could not give any satisfactory reply. He also could not show as to what the petitioners had been doing between 2002 i.e. when the case was transferred to Visakhapatnam Bench of the Tribunal and 2005, when they are said to have acquired knowledge about the steps initiated by respondent No.1 for enforcing decree dated 24.4.2003.

In our opinion, the failure of the petitioners to find out the fate of the case instituted by the Bank under Section 19 of the Act militates against their bona fides. Therefore, it is not possible to act upon the assertion that the ex parte decree was passed by Visakhapatnam Bench of the Tribunal without giving them opportunity of hearing. Moreover, the assertion of the petitioners that notices were not served on them is prima facie belied by the following extracts of para 3 of order dated 24-4-2003 passed by the Tribunal:

> 3. … On behalf of D.1 and 2, one V.S. Krishnudu appeared. The docket shows that he reported no objection for the report of the Commissioner. The record also shows that D3, 4, 5 and 6 were served. Later this case was transferred to this Tribunal and renumbered as OA.No.234 of 2002 and summons were issued to all defendants. The notice sent by courier was received by D6 and refused by D5. Therefore, on 17-10-2002, D5 and 6 were called absent. It was sufficient service for them and they were set ex parte. Fresh summons were ordered for other defendants. On 4.12.2002 a letter was received from D3 that he received summons and requested time. The bank was asked to intimate the D3 about next date of adjournment and

send a copy of OA to D3. Substituted service for D1 and 2 was ordered, as they are not available at the address given by them. Substituted service to D1, 2 and 4 by way of publication in "Eenadu" Nellore edition and "Hindu" Mumbai edition was ordered. On 3.2.2003, D3, who wrote letter on the last occasion was absent. It was noted that it was he to look out to watch the case and date of adjournment. Therefore, D3 was called absent and set ex parte. On 6.3.2003, publication was filed and as it was sufficient service, D1, 2 and 4 were called absent and set ex parte and posted the matter for applicant's evidence to 26.3.2003 and to 23.4.2003. …"

De hors the aforementioned conclusion, we are of the view that interference with the proceedings initiated by respondent No.1 for recovery of the decretal amount is not warranted because the petitioners have got an effective alternative remedy of appeal under Section 20 of the 1993 Act and there are no extraordinary reasons for making a departure from the settled law that the High Court will not entertain writ petition under Article 226 of the Constitution of India if an effective alternative remedy is available to the petitioner. Reference in this connection can be made to the decisions of the Supreme Court in **A.V. Venkateshwaran v. R.S. Wadhwani**, **Thansingh Nathmal v. Superintendent of Taxes**, **Champa Lal v. I.T. Commissioner**, **C.I.T. v. Ramendra Nath Ghosh**, **Titaghur Paper Mills Co. Ltd., v. State of Orissa** and **Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd., and others.**

I n **Baburam v. Zilla Parishad,** the Supreme Court carved out the following two exceptions to the rule of alternative remedy:

1. where proceedings are taken before a Tribunal under a provision of law, which is ultra vires to the Constitution;

2. where the impugned order has been made in violation of the rules of natural justice.

I n **Harbanslal Sahnia v. Indian Oil Corporation Ltd.,** the Supreme Court considered the situations in which the High Court may exercise power under Article 226 of the Constitution of India notwithstanding the availability of alternative remedy and held:

> "The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: *i*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See *Whirlpool Corpn.* v. *Registrar of Trade Marks {(1998) 8 SCC 1}* The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

The petitioners' case does not fall in any of the aforementioned exceptions. They could have filed appeal against order and decree dated 24-4-2003. They could have also applied for condonation of delay by showing that they were not aware of the order and decree passed by the Tribunal. However, the fact of the matter is that instead of availing the remedy of appeal, they have chosen to directly invoke jurisdiction of the High Court under Article 226 of the Constitution, which, in our view, is impermissible.

In the result, the writ petition is dismissed leaving the petitioners free to avail the remedy of appeal under Section 20 of the Act.

Before parting with the case, we consider it proper to mention that during the course of arguments learned counsel for the petitioners made a feeble attempt to persuade the court to entertain

the petition by saying that his clients are prepared to deposit a sum of Rs.10,00,000/-. Subsequently, he modified his statement by saying that his clients would be ready and willing to pay a sum of Rs.20,00,000/-. In our opinion, the tenor of the statement made by the learned counsel for the petitioners shows that his clients are inclined to make bargain with the court, which cannot be accepted under any situation.

G.S. SINGHVI, CJ

R. SUBHASH REDDY, J

December 27, 2005

MVB / svs